90-1944

Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FRED KRUGER, et al

Petitioners,

Vs.

EASTERN AIR LINES, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the post-petition status of the claims underlying this case require a core designation pursuant to 28 U.S.C. §157 even though the claims could exist independent of the Chapter 11 bankruptcy proceedings and are based solely on state law and on federal statutes other than the bankruptcy statute.

2.

Whether parties are entitled to a jury trail in an Article III court when their claims are based on a tort injury and a breach of contract arising from state law and upon the Federal RICO Statute (Chapter 18 U.S.C.) and upon 1983 Discrimination Statute (42 U.S.C. §1983), all of which are independent of the Chapter 11 Bankruptcy Statute (Chapter 11 U.S.C.).

3.

Whether Eastern Air Lines should be required to fund the unfunded $281,540,000 of the pilots pension plan guaranteed by the Pension Benefits Guaranty Corporation, who has asserted a priority lien.

4.

Whether Kruger was denied procedural process because he received no notice whatsoever of the hearing at which the Bankruptcy Court granted the initial injunction.

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The opinion of the United

States Court of Appeals for the

Second Circuit, which is set forth in the Appendix, granted Eastern's motion to dismiss, without a written opinion. (In response to Rule 14 (d) of this Court.)

The grounds on which jurisdiction of this Court is envoked are the divergents of opinions of the 2nd, 8th, 10th and 11th Circuits. (Rule 14 (e).

The date of the entry of the judgment of the Second Circuit is May 7, 1991. (Rule 14 (e) (i)).

The jurisdiction of this Court to review the order of the U.S. Court of Appeals for the Second Circuit is envoked under 28 U.S.C. §1254 (11).(Rule 14 (e) (iv)).

STATEMENT OF CASE

The Petitioners (hereinafter "Kruger") alleged causes of action based upon:

(a) A personal injury tort (the intentional infliction of mental distress);

(b) Breach of a contract between Kruger and Eastern;

(c) Racketerring activity under Federal RICO Statute;

(d) Violation of Section 1983 Discrimination Statute;

(e) Violation of fiduciary duties regarding the pilots pension plans. The original complaint sought damages arising out of all causes of action and demanded a jury trial.

Eastern filed an Adversary Proceeding in its Chapter 11 Bankruptcy case in the New York Bankruptcy Court, naming as Defendants Fred Kruger and Moreton Rolleston, Jr. (the Petitioners herein) as well as J.P. Tristani, Roger Wyatt, Moreton Rolleston, III, Kenneth W. McDonald, Tom Welch, Paul White, Roger W. Tracy, George Hill, Frederick H. Mesmer, Lawrence A. Link and James Hughes. Captain Tom Welch was killed in May 1991 in the Lauda plane crash in Thailand and his estate will be substituted for him. The Bankruptcy Court envoked the automatic stay provision under 11 U.S.C. 157 and issued an injunction against further prosecution of the original complaint filed by Moreton Rolleston, Jr., as attorney for all of the Petitioners

named hereinabove.

Responding to an order of the Atlanta District Court, Eastern filed a motion to dismiss with brief; all of the Plaintiffs in the Atlanta complaint (hereinafter "Tristani") filed a brief; and the District Court granted the motion to dismiss on August 31, 1990. Tristani filed a notice of appeal to the Eleventh Circuit and a request to expedite which was granted. Oral arguemnt before the Eleventh Circuit was on November 14, 1990 and the Eleventh Circuit issued its opinion on November 20, 1990 by which it ordered the case transferred to the U.S. District Court for the Southern District of New York.

Tristani filed a Petition for Writ of Certiorari to the Eleventh

Circuit on December 27, 1990, Case No. 90-1051 in this Court. The Certiorari was denied.

Tristani sought monetary damages, resulting from all alleged causes of action, against Eastern Air Lines, Inc., Texas Air Corporation, Jet Capital Corportion and Frank Lorenzo. Tristani also sought judgment against Eastern, Texas Air, Jet Capital and Lorenzo for the unfunded portion of the Pilot's Pension Plans, known as the A Plan and B Plan in the total amount of $283,540,000. Eastern deducted from the payroll of Tristani as much as 10% of

each payroll check for the purpose of depositing said deduction in the pension plan as Tristani's contribution. However Eastern converted these deductions and used them for operating expenses and never deposited Tristani's money in the Plans. Tristani's deductions are part of the $283,540,000.

The New York District Court had jurisdiction of this action under 18 U.S.C. §1961 (1) (B), and §1962 (a), (b), (c) and (d) (RICO); 42 U.S.C. §1983 (Deprivation of Rights); 28 U.S.C. §1331 (Federal Question); 45 U.S.C., sub-chapter I (Railway

Labor Act) and 28 U.S.C. §1332 (Diversity of Citizenship). (Rule 14 (i).

This writ should be allowed because of the divergence of opinions in various circuits on whether or not a Bankruptcy Court can conduct a jury trial. The Eighth and Tenth Circuits have held that Bankruptcy Courts can not conduct jury trials, even in core proceedings. See In re United Missouri Bank of Kansas City, n.a.

901 F2d 1449 (8th Cir. 1990). In re Kaiser Steel Corp., No. 90-1013 (10th Cir. Aug. 10, 1990) 911 F2d 380, p. 389. The Second Circuit held just the opposite, that is, that a Bankruptcy Court could conduct a jury trial in a core proceeding. See In re Ben Cooper, Inc., et al vs. The Insurance Co. of the State of Pennyslvania, et al, 896 F2d 1394. This Court granted certiorari to the Second Circuit and on November 13, 1990 remanded the case to the Second Circuit to determine jurisdiction. See The Insurance Company of the State of Pennsylvania and Kerwick & Curren, Inc., vs. Ben Cooper, Inc., Case No. 89-1784.

The Eleventh Circuit agreed with the Second Circuit that a Bankruptcy

Court could conduct a jury trial but on June 23, 1989 this Court reversed the Eleventh Circuit in Granfianciera, S.A. et al v. Nordberg, Creditor Trustee For The Estate of Chase & Sanborn Corp., fka, General Coffee Corp. (Case No. 87-1616) 109 Supreme Court 2782 (June 23, 1989). The Second Circuit simply followed its opinion in Ben Cooper and disregarded the judgment of this Court in Granfianciera. The failure to follow the dictates of this Court is deplorable. The Second Circuit should be reversed.

There are other important issues such as denial of procedural due process, Bankruptcy Court jurisdiction, and the unusual

damages of parties already grieved and deprived of a livehood by a grossly mismanaged and plundered Eastern Air Lines. We are entitled to a jury trial in the original forum in Atlanta, the site of Eastern's principal base before bankruptcy.



Moreton Rolleston, Jr.
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Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
For The Second Circuit

EASTERN AIR LINES, INC,
Plaintiff-Appellee,

v.

MORETON ROLLESTON, JR. and
FRED KRUGER,
Defendants-Appellants,

DOCKET NO. 91-5024
NOTICE OF MOTION for dismissal of appeal as moot and extension of time to file brief.

ORDER

Before: Hon. George C. Pratt, Hon. Roger J. Miner, Hon. Frank X. Altimari, CJJ.

IT IS HEREBY ORDERED that the motion to dismiss be and it hereby is granted.

May 7, 1991.

Elaine G. Goldsmith, Clerk
By: Edward J. Guardaro,
Deputy Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Nos. 89 B 10448(BRL)	:	CIVIL ACTION
89 B 10449(BRL)	:	NUMBERS
	:	90 Civ.3378(MBM)
	:	90 Civ.3379(MBM)
IONOSPHERE CLUBS,INC. and	:	90 Civ.3380(MBM)
EASTERN AIR LINES,INC.	:	90 Civ.3381(MBM)
	:	90 Civ.3382(MBM)
Debtors.	:	90 Civ.3384(MBM)
EASTERN AIR LINES, INC.	:	
	:	
Plaintff,	:	OPINION AND ORDER
	:	
-against-	:	
	:	
MORETON ROLLESTON, JR.,and	:	
FRED KRUGER,	:	
	:	
Defendants.	:	

The Bankruptcy Court has power under :362 of the Bankruptcy Code to determine that there has been a violation of the automatic stay and enjoin the Rolleston plaintiffs from proceeding other than in this District. Under §157 of the Bankruptcy Code, the Bankruptcy Court has jurisdiction over core proceedings, which includes "(A) matters concerning the adminsitration of the estate; (and) (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11." 28 U.S.C. §157(2). As quoted in Budget Service Co. vs. Better Homes of Virginia, Inc., 804 F.2d 289 (4th Cir. 1986), the legislative

history of §362 provides, inter alia, that:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Id. at 292 (quoting House Report No. 95-595, 95th Cong., 1st Sess. 340-2 (1977); Senate Report No. 95-989, 95th Cong., 2nd Sess. 54-55 (1978); reprinted in 1978 U.S. Code & Adm. News 5787 at 5840 and 6296-97).

I agree with the Fourth Circuit that a proceeding to prosecute a violation of the automatic stay is a core proceeding within the meaning of 28 U.S.C. §157. Enforcement of the automatic stay is essential to orderly and equitable adminsitration of the estate. I therefore affirm the holding of the Bankruptcy Judge that suits by the

trustee to prosecute violations of the automatic stay are within the jurisdiction of the Bankruptcy Court.

III.

Plaintiffs argue that their claims arose post-petition, and hence are not barred by the automatic stay, 28 U.S.C. §362. Their claims fall into three categories: (1) that Eastern violated the RLA, RICO, and 42 U.S.C. §1983 by refusing to accept bids from striking or formerly striking pilots; and that Eastern violated RICO (2) by allegedly failing to fund its pilot pension plan an converting the benefit sums paid by the pilots to their own use, and (3) by allegedly failing to pay interest on certain pension benefits that have already been paid. See Memorandum Decision on Motion for a Determiantion of Automatic Stay Violation and for a Section 105

Injunction, slip op. at 8-9 (Bankr. S.D.N.Y. March 14, 1990).

Judge Lifland did not determine whether the Rolleston plaintiffs' assertion of the pilot bid grievance issue violated the automatic stay: "this Court defers determining at this time whether the inclusion of the bid procedure issue as part of the Rolleston lawsuit violates the automatic stay." Memorandum Decision at p.18. Rather, the Court analyzed the conversion claim brought in Count One - plaintiffs' claim that Eastern failed to contribute to the benefit funds and instead converted the fudns to its own use - and found that the relief plaintiffs request in conjunction with this claim violates the automatic stay. Section :362 (a) (3) reads:

> (a) Except as provided in subsection (B) of this section,

> a petition filed under section 301, 302 or 303 of this title, .. operates as a stay, applicable to all entities, of - ... (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

Any attempt to freeze Eastern's assets and to obtain an order requiring Eastern to transfer cash from its estate to the pilot pension plans is an attempt to assert control over Eastern's assets to the detriment of other creditors. Plaintiffs argue that the property does not belong to Eastern, but rather belongs to the pilots who made contributtions to the funds out of their paychecks. Whether Eastern owes property in the form of these funds to the pilots is still a question to be decided. Even assumning Eastern does owe money to the pilots, the Rolleston plaintiffs, in asserting this claim, are in no way different from any other creditor

with a claim against Eastern. They articulate no reason why they are entitled to any preferred status, nor could they. I affirm the Bankruptcy Court's determination that the relief requested - freezing $281 million in Eastern assets - is "a direct attempt to secure preferred status for a discrete group of creditors [which] runs directly counter to the distribution and oversight scheme established by the Code" and that that attempt was made in violation of 11 U.S.C. §362(a) (3).

The Bankruptcy Court found that the claims outlined in Count Two of plaintffs' Complaint were brought in violation of the automatic stay. According to the Bankruptcy Court, Count Two "represents a clear effort to asset a claim against the estate

and to control property of the estate." Be that as it may, not all claims brought against an estate are brought in violation of the automatic stay. Plaintiffs argue that these claims are post-petition claims, and therefore do not violate the automatic stay, because the alleged racketeering activity which is the basis for their claims occurred after the petition was filed. Eastern filed its petition in March 1989. According to plaintiffs' Complaint, the plaintiff pilots who did not receive interest on be benefit funds taken out of Plan B retired in November and December 1989. The interest on that principal would, under plaintiffs' theory, begin to accrue and become due only after the filing.

Eastern maintains that these are pre-petition claims arising out of an executory contract within the meaning

MICHAEL B. MUKASEY, U.S.D.J.

This is an appeal by two defendants in the adversary proceeding brought by Eastern- Moreton Rolleston, Jr. and Fred Kruger- from an order issued by Chief Judge Lifland of the Bankruptcy Court on March 14, 1990, which pursuant to 11 U.S.C. §105, (1) enjoined the defendants ("the Rolleston plaintiffs") from continuing a lawsuit in the Northern District of Georgia pending the determination of an identical unreinstated strikers' bid grievance issue in the ALPA lawsuit; (2) enjoined prosecution of their claims to freeze Eastern's assets and to receive interest on pilot pension funds, since such control over property of the estate would violate 11 U.S.C. §362- the automatic stay; and (3) enjoined them from proceeding against Eastern's co-defendants in the Georgia lawsuit. Judge Lifland

also found that the Rolleston plaintiffs violated the automatic stay by filing the Georgia lawsuit against Eastern after Eastern filed its petition for bankruptcy seeking to freeze $281 million in Eastern assets for alleged conversion of pilot benefit funds to Eastern's own use and alleging that Eastern violated RICO by willfully withholding interest payments on benefit funds. For the reasons set forth below, the Bankruptcy Court's rulings are affirmed in all respects other than its finding that the assertion of the RICO claim for failure to pay interest allegedly due plaintiffs violated the automatic stay.

I.

On May 9, 1989 Eastern filed a petition for bankruptcy in the Bankruptcy Court of the Southern District of

New York. On February 12, 1990 Moreton Rolleston, Jr. ("Rolleston") filed on behalf of his son, Moreton Rolleston, III and 16 other formerly striking Eastern pilots ("the Rolleston plaintiffs") a purported class action in the Northern District of Georgia ("the Rolleston lawsuit"). In addition to Eastern, the Rolleston lawsuit names as defendants Texas Air Corporation, Jet Capital Corporation, Frank Lorenzo, Hawthorne Associates, Inc., and Trust Administrative Committee of B Plan as the Fiduciary of B Plan. The Complaint alleges violation of the Railway Labor Act ("RLA"), the Racketeer Influenced and Corrupt Organization Act ("RICO") and 42 U.S.C. §1983.

The Rolleston plaintiffs have essentially three grievances. First, in Count One of the Complaint filed in

the federal court in Georgia, they allege claims based on Eastern's failure to reinstate striking pilots after the strike was terminated pursuant to the provisions of the collective bargaining agreement entered into between Eastern and the pilots prior to Eastern filing for bankruptcy ("the pilot bid issue"). Second, also in Count One, the Rolleston plaintiffs assert claims based on Eastern's alleged failure to fund the pilot's benefit plans and alleged conversion of the funds to Eastern's own use. Appellants concede that this alleged violation of 18 U.S.C. §664 - embezzlement of pension funds- occurred prior to Eastern filing for bankruptcy. Third, in Count Two, the Rolleston plaintiffs allege a violation of RICO, the RLA and 28 U.S.C. § 1983 based on Eastern's alleged failure to

pay retiring pilots interest on funds withdrawn pursuant to the benefit plans. According to the plaintiffs, under their union contract, when a pilot resigns before he reaches age 50, he is entitled to receive his share of the B Benefit Plan as that share is valued on the last day of the month during which the pilot submitted his resignation, as well as interest on that sum from the day it became due until the day he actually receives it. Plaintiffs claim that Eastern has withheld interest payments, as well as in some cases, principal, in violation of the RLA, 28 U.S.C. §1983 and 18 U.S.C. §664 - a RICO predicate act. See 18 U.S.C. §1961 (1)(B).

Eastern filed the adversary proceeding seeking an injunction to bar defendant Rolleston and the 17

Rolleston plaintiffs from proceeding in the Georgia action, and a determination that the Rolleston lawsuit was brought in violation of the automatic stay.

Appellants raise several issues on appeal, of which only the following need be treated:[1] (1) Does the bankruptcy court have jurisdiction to issue an injunction under §105 to determine whether there has been a violation of the automatic stay? (2) Did the Bankruptcy Court correctly decide to issue such an injunction and to make such

---

[1] Appellants raise a host of issues neither decided below nor necessary to this decision. To the extent that those issues are not specifically addressed in this opinion, appellants are advised that pursuant to the general reference of all bankruptcy cases in this district, any motions other than for withdrawal of the reference must first be made in the bankruptcy court.

a determination? (3) Were appellants denied procedural due process? (4) Is there jurisdiction and venue over the Eastern bankruptcy proceedings in the Southern District of New York? (5) Did the Bankruptcy Judge have jurisdiction to enjoin the Rolleston plaintiffs, including their lawyer, Moreton Rolleston, Jr., from proceeding in Georgia against Eastern's co-defendants there?

II.

A district court must accept the findings of fact of a bankruptcy court, whether based on oral or documentary evidence, unless clearly erroneous. Conclusions of law are reviewable de novo. Truck DriversLocal 807, etc. v. Carey Transp. Inc., 816 F.2d 82 (2d Cir. 1987).

of 11 U.S.C. §365(g) (1), which states:

> (g) Except as provided in subsections (h) (2) and (i) (2) of this section, the rejection of any excutory contract or unexpired lease of the debtor constitutes a breach of such contract or lease -
> (i) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition . . . "

Plaintiffs claim that their right to interest is based on their union contract. Under N.L.R.B. V. Bildisco & Bildisco, 465 U.S. 513 (1984), colelctive bargaining agreements are executory contracts within the meaning of §365. The collective bargaining agreement between the Eastern pilots and Eastern has been neither assumed nor rejected as of the present. Therefore, if plaintiffs asserted a claim for breach of the union contract, that claim would be considered a pre-petition claim, even if the activities

which allegedly constitute the breach occurred post-petition, and would be stayed under 11 U.S.C. §362.

The Bankruptcy Court did not address whether Count Two asserted pre- or post-petition claims. Because I find that the Rolleston plaintiffs seem to be articulating claims that arose post-petition, I remand this issue to the Bankruptcy Court so that it can reconsider, if necessary, its determination that these claims were brought in violation of §362. It may be that because Rolleston and the Rolleston plaintiffs are enjoined from pursuing the Georgia lawsuit under 11 U.S.C. §105, and because Eastern, as a corporation, is not entitled to damages under 11 U.S.C. §362(h) for violations of the automatic stay, it makes little difference whether Count Two violates §363. Plaintiffs do not assert a claim for breach of contract in Count Two

I therefore need not decide the effect of 11 U.S.C. §1113, adopted in response to Bildisco & Bildisco, on §365(g) and collective bargaining agreements. Rather, they assert a violation of RICO. A RICO claim arises when the plaintiff discovers or should have discovered an injury caused by defendant's violation of 18 U.S.C. §1962. Bankers Trust Co. vs. Rhoades, 859 F.2d 1096, 1105 (2d Cir.), cert. denied, 490 U.S. 1007 (1988). Plaintiffs assert that, after filing for bankruptcy, Eastern embezzled interest payments due pilots on their share of the B Benefit Fund. Their alleged injury was suffered post-petition, and therefore their claims are post-petition claims and assertion of them did not violate the automatic stay.

IV.

Plaintiffs also challenge jurisdiction and venue over the Eastern bankruptcy proceedings in the Southern District of New York. Neither of these challenges was properly raised in the bankruptcy proceedings. The Eastern Air Lines bankruptcy case remains in the Bankruptcy Court pursuant to the general reference of all bankruptcy cases in this district. Therefore, their venue and jurisdiction arguments must first be brought in the Bankruptcy Court. Should plaintiffs persist in pressing these arguments in the face of Bankruptcy Rule 9011, the Bankruptcy Court will regain jurisdiction to decide questions raised for the first time in the bankruptcy court proceedings after plaintiffs filed this appeal

upon its resolution.

V.

Plaintiffs Kruger and Rolleston contend that they were denied due process in that they were given no notice of hearings before Judge Lifland on March 23, 1990 and March 29, 1990 which were the basis for the opinions from which they appeal. They raise three points: (1) that Kruger received absolutely no notice, (2) that Rolleston did not receive notice until three days before the hearing on the preliminary injunction and one day before the hearing on the permanent injunction -- insufficient preparation time to constitute reasonable notice, and (3) the permanent injunction hearing was held before Plaintiffs' time had run to file responsive pleadings

in the adversary proceedings.

There was no hearing on March 29, 1990. March 29th was the day the order granting a permanent injunction was issued; the hearing on the motion for the permanent injunction was held on March 23, 1990.

The Bankruptcy Court found that Rolleston received adequate notice of the permanent injunction hearing held on March 23, 1990, and I affirm that finding. On March 9, 1990, Rolleston received the Verified Complaint in the Adversary Proceeding, Exhibits thereto, and a Temporary Restraining Order and Order Pursuant to Bankruptcy Rule 7065 Directing Defendant to Show Cause Why a Determination Under Bankruptcy Code Sections 362(a) Should Not Be Issued, directing the Rolleston plaintiffs to appear at a preliminary injunction hearing on

March 14, 1990. (Exhibit I, Exhibit G)

Rolleston chose not to appear at the preliminary injunction hearing, and instead filed a motion in the Georgia action for withdrawal of the reference of the Adversary Proceeding in the Bankruptcy Court in the Southern District of New York under 11 U.S.C. §157(d), and transfer under 28 U.S.C. §1404(a). Rolleston identified himself in those moving papers as attorney for himself and for all defendants in the adversary proceeding other than four defendants not appellants here. Judge Camp of the Northern District of Georgia denied Rolleston's "extraordinary request". (Exhibit K)

At the prelimiary injunction hearing, Judge Lifland denied Eastern's request to consolidate the

preliminary and permanent injunction hearings under Fed. R. Civ. P. 65 in order to give the Rolleston plaintiffs another opportunity to appear to be heard.

According to the Affidavit of Service attached as Exhibit M, on March 15, 1990 Rolleston received a letter from Eastern's Atlanta lawyer, David Brown of Smith, Gambrell & Russell, enclosing the Judge Lifland's preliminary injunction order and stating in the third paragraph: "Judge Lifland has also set a hearing for Friday, March 23, at 10:00 AM in New York to determine whether a permanent injunction should issue along the lines as described above." In addition, on March 22, 1990, Smith hand-delivered to Rolleston a letter confirming a telephone conversation

between them earlier that day regarding the hearing scheduled March 23rd (Exhibit M) Neither Rolleston himself nor any of the Rolleston plaintiffs appeared at the March 23rd hearing. The Bankruptcy Court granted the permanent injunction at the conclusion of the hearing, issuing the Order on March 29, 1990. Rolleston therefore received eight days notice of the permanent injunction hearing. Smith's letter enclosing the preliminary injunction order was delivered to Rolleston's office on March 15, 1990. Rolleston's secretary informed Smith that Rolleston was out of town until March 20th. Smith advised the secretary of the contents of the documents enclosed and told her that Rolleston should be contracted as soon as possible. Rolleston does not deny that his office

received the letter, but rather states that he did not receive notice of the permanent injunction hearing until March 20, 1990. Under the circumstances, I must agree with the Bankruptcy Court that Rolleston received reasonable notice before the permanent injunction hearing.

There is no requirement under the Federal Rules of Civil Procedure that the Bankruptcy Judge delay the permanent injunction hearing until after the time had run for the Rolleston plaintiffs to file an Answer to the Complaint in the Adversary Proceeding. Judge Lifland could have accelerated the permanent injunction hearing in order to consolidate it with the hearing on the preliminary injunction under Fed. R. Civ. P. 65(a) (2). If he had, he would only have had to ensure

that the parties have adequate notice of the consolidation and an opportunity to present any relevant evidence. Reese Publishing Co. v. Hampton Int'l Communications, Inc., 620 F.2d 7 (2d Cir. 1980). There is no requirement that the defendant -- here the Rolleston plaintiffs-- must have filed an answer before a permanent injunction may issue, or that the time to do so have expired. Judge Lifland did not in fact consolidate the hearings but rather put off the permanent injunction hearing in order to ensure that the Rolleston plaintiffs had an adequate opportunity to present arguments why their Georgia lawsuit was not in violation of the automatic stay and why any injunction under §105(a) should not be issued. Rolleston did

not request from the Bankruptcy Court a stay of the hearing so that he could conduct discovery.

Kruger received adequate notice through notice to his attorney, Moreton Rolleston, Jr., Judge Lifland found in a Memorandum Endorsement read into the record on April 24, 1990 that all of the plaintiffs in the Rolleston lawsuit are represented by Moreton Rolleston, their attorney in Atlanta proceedings, and that Rolleston, as their attorney, was properly noticed for the hearings. Judge Lifland cites as evidence various documents filed by plaintiffs in the bankruptcy proceedings, including a "Designation of Clerk for Service" which requests the Clerk of the Court to forward any papers which are served upon

that Rolleston Plaintiff, not to that individual's personal address but to the address of Rolleston's Atlanta law office. Again, Rolleston identified himself in his motion to withdraw the reference and transfer the adversary proceeding as attorney for himself and for all defendants in the adversary proceeding other than four defendants who are not appellants here. I affirm Judge Lifland's findings of fact and his conclusion that Kruger received adequate notice, and furthermore agree with the Bankruptcy Court that Rolleston's assertion that he is an attorney for his clients at his discretion, only when it suits his and their ends, is a manipulative attempt to abuse the system.

IV.

The final question on appeal is,

did the Bankruptcy Court properly enjoin the Rolleston plaintiffs, including Moreton Rolleston, Jr., their attorney, from proceeding in the Georgia action against Eastern's co-defendants in that suit: Texas Air Corporation, Jet Capital Corporation, Frank Lorenzo, Trust Administrative Committee of B Plan as the Fiduciary of B Plan and Hawthorne Associates, Inc., none of whom are petitioners in bankruptcy. Appellants contend that the Bankruptcy Court lacked jurisdiction to issue that injunction. Under 11 U.S.C. §105(a) a bankruptcy judge has the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This power, though it can be exercised only within the confines of the Bankruptcy

Code, extends to creditor's actions against third parties, when such an injunction is necessary to protect the debtors and the parties in interest to the reorganization in their attempt to reorganize successfully. In re Chatequgay Corp., 109 Bankr. 613, 621-22 (S.D.N.Y. 1990); A H. Robins Co. vs Piccinin, 788 F.2d 994, 1003 (4th Cir.), cert. denied, 479 U.S. 876 (1986). The Bankruptcy Court found that continuation of the Rolleston lawsuit against Eastern's co-defendants would involve, burden and directly affect Eastern, and would likely prejudice Eastern's future defense of identical claims based upon identical facts. The Rolleston lawsuit therefore could adversely affect the debtor's estate and accordingly could be enjoined

as to all defendants. The Bankruptcy Court found also that the claims against Eastern's co-defendants were "'inextricably interwoven'" with the claims against Eastern, "'presenting common questions of law and fact, which can be resolved in one proceedings.'" Memorandum Decision at 24 (quoting Federal Life Ins. Co. v. First Financial Group, Inc., 3 Bankr. 375, 376 (S.D. Tex. 1980); accord In re Johns-Manville Corp. 26 Bankr. 420 (Bankr.S.D.N.Y. 1983). In view of these findings based on the facts before it, which I cannot find clearly erroneous, I affirm the judgment of the Bankruptcy Court that an injunction is warranted against continued prosecution of the Rolleston lawsuit against Eastern's co-

defendants other than in the Bankruptcy Court.

Appellants argue that the injunction has become moot because of the appointment of a trustee after the injunction was issued and because their suit has not interfered with the reorganization. According to appellants, these developments indicate that the reasons for issuing the injunction no longer exist. Pursuant to the general reference in this District of all matters to the Bankruptcy Court, any issue as to whether there has been a change in circumstances such that the injunction should be modified or lifted must first be raised there.

* * *

For the reasons set forth above, the Bankruptcy Court's Orders dated March 14 and March 29, 1990 are affirmed, except as to the finding that the Rolleston plaintiffs' RICO claim as articulated in Count Two was brought in violation of the automatic stay.

SO ORDERED:

Michael B. Mukasey
U.S. District Judge

Dated: New York, New York
February 14, 1991

(2)

NO. 90-1944

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FRED KRUGER, et al.,

Petitioners,

v.

EASTERN AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Rosanne R. Pisem

QUESTION PRESENTED

1. Whether this Court should even entertain this petition given that: (a) the court below dismissed petitioners' appeal as moot; (b) most of the issues raised by petitioners have not been adjudicated below; and (c) this Court has previously rejected consideration of two identical issues in petitioners' prior petition for a writ of certiorari based on an order of the United States Court of Appeals for the Eleventh Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1944

FRED KRUGER, et al.,

Petitioners,

v.

EASTERN AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Eastern Air Lines, Inc. ("Eastern")[1] respectfully requests this

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1. Pursuant to Rule 29.1 of the Rules of this Court, Eastern hereby states that its nominal parent company is Continental Airlines Holdings, Inc. ("CAH"). On April 19, 1990, a chapter 11 Bankruptcy Trustee, Martin R. Shugrue, Jr., was appointed by the United States Bankruptcy Court for the Southern District of New York to manage and

(continued...)

Court to deny the Petition for a Writ of Certiorari seeking review of the Mandate of the United States Court of Appeals for the Second Circuit entered on May 7, 1991, which dismissed petitioners' appeal as moot.

The petition arises from an adversary proceeding filed by respondent Eastern Air Lines ("Eastern") in its chapter 11 bankruptcy case in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The adversary proceeding was filed in response to petitioners' suit against Eastern in the United States District Court for the Northern District

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1. (...continued)
control Eastern, replacing CAH (then known as Texas Air Corporation) and its management. See In re Ionosphere Clubs, Inc., 113 Bankr. 164 (Bankr. S.D.N.Y. 1990). Eastern's only non-wholly owned subsidiary is Bar Harbor Airways, Inc. ("BHA"). Eastern owns 99.5% of BHA's outstanding stock.

of Georgia in February 1990 (the "Georgia lawsuit"). The Georgia lawsuit was filed considerably after the filing of the chapter 11 bankruptcy petition of respondent Eastern in the Bankruptcy Court, and was commenced without any request to the Bankruptcy Court to lift the automatic stay in bankruptcy to allow the suit to proceed. As discussed further below, the Georgia lawsuit is not the subject of the petition. Instead, the petition involves only the Bankruptcy Court adversary proceeding, which Eastern commenced in order to obtain an injunction against prosecution of the Georgia lawsuit.

In the adversary proceeding, Eastern sought to enjoin the Georgia lawsuit as a violation of the automatic stay imposed by the Bankruptcy Code (11 U.S.C. § 362). The Bankruptcy Court issued an injunction that barred the prosecution of the Georgia lawsuit on the grounds, inter

alia, that the lawsuit had been brought in violation of the automatic stay. That injunction was affirmed in an Opinion and Order of the United States District Court for the Southern District of New York, dated February 14, 1991.

The injunction issued by the Bankruptcy Court, and affirmed by the District Court, restrained petitioners from prosecuting the claims raised in the Georgia lawsuit in any case other than the bankruptcy case of Eastern. As discussed below, an appeal from the District Court's order was taken to the United States Court of Appeals for the Second Circuit, but that appeal was dismissed as moot.

The Second Circuit's determination of mootness stems from events involving the Georgia lawsuit. Notwithstanding the Bankruptcy Court's order enjoining prosecution of the Georgia lawsuit, the peti-

tioners continued prosecution of that action until it was dismissed by the United States District Court for the Northern District of Georgia. An appeal from that dismissal was taken to the United States Court of Appeals for the Eleventh Circuit, which vacated the dismissal and ordered the transfer of the Georgia lawsuit to the Southern District of New York (where Eastern's bankruptcy case is pending) pursuant to 28 U.S.C. § 1404(a). The transfer occurred on November 30, 1990.

Petitioners then filed a petition for a writ of certiorari, No. 90-1051, based on the transfer order of the United States Court of Appeals for the Eleventh Circuit. The petition was denied by this Court in an order dated February 19, 1991. Tristani v. Eastern Air Lines, Inc., ____ U.S. _____, 111 S. Ct. 970 (1991).

After the United States District Court for the Southern District of New York had affirmed the Bankruptcy Court's injunction, it issued an Opinion and Order dated February 27, 1991 directing that the separate Georgia lawsuit -- which had been transferred to New York pursuant to the Eleventh Circuit's order -- be referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and the District Court's "Standing Order of Referral of Cases to Bankruptcy Judges." The Georgia lawsuit is now an adversary proceeding in the Eastern bankruptcy case and is pending in the Bankruptcy Court. Because the Bankruptcy Court's injunction did not bar prosecution in the Bankruptcy Court of the claims in the Georgia lawsuit, and the Georgia lawsuit was independently transferred to the Bankruptcy Court, the Bankruptcy Court's

injunction no longer bars prosecution of that lawsuit.

Notwithstanding the fact that prosecution of the Georgia lawsuit is no longer barred, petitioners appealed the District Court's affirmance of the Bankruptcy Court's injunction to the United States Court of Appeals for the Second Circuit. Respondent Eastern moved to dismiss the appeal as moot in light of the transfer of the Georgia lawsuit to the Bankruptcy Court, which had the effect of removing the injunction against prosecution of that lawsuit. While the injunction had also provided the basis for certain damages claims against petitioners, those claims were settled in return for payments of $100,000 by petitioner Rolleston. Therefore, the injunction order that petitioners sought to appeal was moot.

The United States Court of Appeals for the Second Circuit dismissed petitioners' appeal as moot on May 7, 1991. (The Second Circuit's order is reproduced as page A-1 of the petition).

REASONS FOR DENYING THE PETITION

Petitioners filed their present petition for a writ of certiorari on June 20, 1991. Petitioners have failed to suggest any basis upon which this Court should conclude that their appeal is not moot.

In addition, the first two questions presented for this Court's review are identical to questions presented in petitioners' previous petition, in which they sought a writ of certiorari to review the transfer order of the United States Court of Appeals for the Eleventh Circuit. These are the issues of whether the alleged post-petition status of the claims in the Georgia lawsuit requires a

core bankruptcy designation pursuant to 28 U.S.C. § 157, and whether a bankruptcy court can conduct a jury trial. This Court rejected consideration of these issues by denying petitioners' previous petition for a writ of certiorari.

The first two questions, as well as the third question presented in the petition, involve litigation of the substantive claims raised in the Georgia lawsuit, but have no relevance to the injunction ordered in the separate adversary proceeding that is now before this Court. The courts below decided that the Georgia lawsuit violated the automatic stay without considering any of the first three questions raised in the petition. Thus, the first three questions presented are not properly before this Court.

By asserting that they are entitled to a trial in Atlanta, Georgia, see

petition at 11, petitioners also appear to be seeking to transfer the Georgia lawsuit back to the District Court in Georgia. However, the transfer issue was not before the Second Circuit, nor is it properly before this Court, because this appeal involves the adversary proceeding commenced by respondent Eastern in the Bankruptcy Court, rather than the Georgia lawsuit.

The fourth question raised in the petition involves a due process issue that was fully considered in the opinion of the District Court (pages 20-27), which rejected petitioners' contentions. (The opinion of the District Court is annexed to the petition beginning at page A - 2.) The petition makes no effort to dispute the ruling of the District Court, and actually contains no legal argument on any issue other than the jury trial issue.

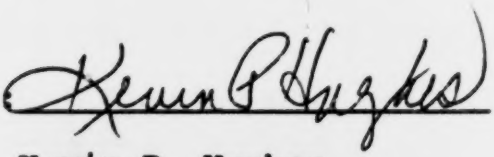
CONCLUSION

Because the court below dismissed petitioners' appeal as moot, because most of the issues raised by petitioners have not been adjudicated below, and because this Court has previously rejected consideration of two identical issues, certiorari should not be granted in this case.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WEIL, GOTSHAL & MANGES

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the foregoing Respondent's Brief In Opposition upon

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by depositing the requisite number of copies of the same in a properly addressed first-class postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York on July 19, 1991.

Kevin P. Hughes